1992

Rita B. Gum v. James Richard Gum : Brief of Appellee

Utah Court of Appeals

Glen M. Richman; Attorney for Appellee.
Rita C. Gum; In Propia Persona Plaintiff/Appellant.

IN THE UTAH COURT OF APPEALS STATE OF UTAH

RITA B. GUM, Plaintiff and Appellant vs. JAMES RICHARD GUM, Defendant and Appellee	Court of Appeals No. 920164 CA Priority Classification No. 15

BRIEF OF APPELLEE

APPEAL FROM A JUDGMENT (DECREE OF DIVORCE)
OF THE THIRD DISTRICT COURT
SLAT LAKE COUNTY, STATE OF UTAH
THE HONORABLE JOHN A. ROKICH
JUDGE

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Salt Lake City, Utah 84105
In propria persona
Plaintiff/Appellant

GLEN M. RICHMAN, Esq.
60 South 600 East, Suite 100
Salt Lake City, Utah 84102
Attorney for
Defendant/Appellee

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JURISDICTION

The Court of Appeals has jurisdiction of this matter as provided by Rule 78-2a-3(h), Utah Code Annotated, 1953 as amended.

> Appeals from district court involving domestic cases, including but not limited to divorce, annulment, property division, child custody, support, visitation, adoption and paternity.

GLEN M. RICHMAN, (2752)
RICHMAN & RICHMAN
Attorneys for Appellee
60 South 600 East, Suite 100
Salt Lake City, Utah 84102
Telephone: (801) 532-8844

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

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BRIEF OF APPELLEE

NATURE OF THE PROCEEDINGS

This is an appeal from an amended decree of divorce. Appellant has filed a second appeal in this action after disposition in the trial court upon remand from the Court of Appeals.

Appellant's first appeal resulted in an affirmance of most all of the disposition in the trial court and a remand for limited purposes. Those limited purposes were to reconsider matters pertaining to Finding #17 on attorney's fees and consideration with

respect to Appellee's pension. The Appellate Court also noted the trial court's discretion to readjust other matters if necessary after reconsideration of the issues as directed.

After remand, and appropriate proceedings, including a determination by the presiding judge of the trial court, that the trial judge was not disqualified as alleged by Appellant under the provisions of Rule 63(b), Utah Rules of Civil Procedure, the trial court took evidence and entered Amended Findings of Fact, Amended Conclusions of Law and an Amended Decree of Divorce.

Appellant claims the Amended Decree of Divorce was illegal; the procedures followed were improper; the remand direction was not followed; and that the trial court was disqualified by judicial bias and misconduct.

STATEMENT OF ISSUES AND STANDARD FOR REVIEW

I. **DID THE TRIAL COURT CONSIDER THE MATTERS AS DIRECTED BY THE REMAND ORDER AND DID THE TRIAL COURT MAKE SUFFICIENT FINDINGS UPON THE EVIDENCE?**

II. **WAS THE DETERMINATION BY THE TRIAL COURT UPON THE FACTS CLEARLY ERRONEOUS?**

III. **WAS IT PROPER FOR THE TRIAL COURT ASSIGNED TO THIS CASE TO PROCEED WITH THE FINAL DISPOSITION; WAS THE TRIAL COURT DISQUALIFIED**

BY JUDICIAL BIAS, AND WAS THE MOTION OF APPELLANT CLAIMING BIAS APPROPRIATELY DETERMINED?

IV. IS THE APPEAL OF APPELLANT FRIVOLOUS AND WITHOUT MERIT?

V. SHOULD FEES AND COSTS BE AWARDED IN FAVOR OF APPELLEE?

STANDARD OF REVIEW

1. The standard of review with respect to the matters to be determined pertaining to the considerations of Appellee's pension, fees and costs involves the application of the clearly erroneous test.

2. For Appellant to succeed on this appeal, she must meet her burden to marshal the evidence from the record to show that the findings of the trial court are clearly erroneous when viewed in the light most favorable to the Appellee. Rule 52(a), Utah Rules of Civil Procedure.

3. The standard of review regarding the claim of bias or disqualification of the court under Rule 63(b), Utah Rules of Civil Procedure involves the application of a rule or statute which will be reviewed by the Appellate Court for correctness.

4. The standard for review regarding a frivolous appeal questions whether the appeal was meritorious from the outset or

sought for an improper purpose as described in Rule 33, Utah Rules of Appellate Procedure. If found to be frivolous, an appropriate sanction will be the award of fees and costs to Appellee, and if appropriate, the provisions of Rule 40, Utah Rules of Appellate Procedure will be applied.

STATEMENT OF THE CASE

The instant case was before the trial court, the Honorable Judge John A. Rokich, on remand from the Court of Appeals, directing the trial court to consider certain limited and specified matters relating to insufficient findings of fact regarding attorney's fees and costs and Appellee's pension. The Court of Appeals, in commentary, noted the trial court's discretion to adjust other aspects of property distribution, if in determination of the costs, fees and pension matters, the trial court felt it proper to make such an adjustment. (Record 236)

STATEMENT OF FACTS

Because of the disposition of the Appellate Court on Appellant's first appeal affirming, for the most part, the trial court, certain matters included in Appellant's brief relating to the parties' marriage and the divorce proceedings are not relevant and will not be discussed in Appellee's responsive brief. It is submitted that the factual recitation of Appellee and the Statement of the Case by Appellee contain the relevant matters pertaining to

this appeal.

The remand was dated May 23, 1991. (Record 236)

Appellant appealed March 12, 1992 from the entry of the amended decree of divorce.

Appellant filed an affidavit of prejudice directed toward the trial court dated June 3, 1991. (Record 224)

Appellant's affidavit was opposed by affidavit of Appellee's counsel. (Record 226)

Appellee's counsel filed a notice to submit for decision under Rule 4-501(1)(d), Utah Rules of Judicial Administration (now Utah Code of Judicial Administration), the 11th day of September, 1991. (Record 253)

On the 6th day of September, 1991, Appellee's counsel addressed a letter, with a copy to Appellant, to the trial court, requesting the establishment of a procedure for disposition of the action. (Record 258)

Appellee's counsel filed a certification of readiness for trial bearing a blank date of September, but showing a filing date in the clerk's office of September 12, 1991.

Appellant objected to the certification of readiness on the basis that discovery was not completed on medical testimony; stating that jury trial could be demanded, and that her motions needed disposition. (Record 359)

Appellee's counsel made a motion for scheduling and management conference and for an order to show cause on an unrelated matter pertaining to the visitation with the minor child September 23, 1991. (Record 262) The motion was supported by a memorandum of points and authorities. (Record 264)

The Court made and entered a Minute Entry 9/25/91, finding no bias on the part of the trial court and finding that it was appropriate for the judge assigned to conclude the case. (Record 268)

The order to show cause was personally served upon the Appellant on the 25th day of September, 1991, (Record 282) requiring her attendance in court on the 7th day of October, 1991 at the hour of 10:00 a.m.

The Court made a further Minute Entry dated 10/3/91 with a copy to Appellant, instructing her that she was required to appear on October 7, 1991. (Record 301)

The Court entered a Minute Entry dated 10/7/91 showing the Appellant appearing on her own behalf and that the matter was set for evidentiary hearing on November 1, 1991 at the hour of 3:00 p.m. (Record 302)

The Court entered a Minute Entry dated 11/1/91, showing Appellant's failure to appear; that the matter of her motion to disqualify the Court under Rule 63(b), Utah Rules of Civil

Procedure had been determined by the presiding judge, denying the motion and instructing the assigned judge to proceed with the determination of the case.

The November 1, 1991 Minute Entry shows Appellee was sworn and examined and that the Court took testimony and took the matter under advisement. (Record 303)

The Presiding Judge of the Third District Court entered an order bearing the date of December 3, 1991, confirming his determination that it was appropriate for the trial court judge assigned to conclude the matter, finding Appellant's motion legally insufficient. (Record 304)

The Amended Findings of Fact, the Amended Conclusions of Law and the Amended Decree of Divorce were entered by the trial court bearing a date the 14th day of February, 1992. (Record 322 through 335 and Record 358 through 362)

The Appellant filed a notice of appeal to the Supreme Court of the State of Utah with the Third District Court on the 12th day of March, 1992. (Record 375)

SUMMARY OF ARGUMENTS

1. Appellant has failed to meet her burden to marshal the evidence in support of her attack upon the Amended Decree and to show that the Findings, Decree, and determination of the trial court were clearly erroneous. See Berger v. Berger, 713 P.2d 695

(Utah 1985), Bonwich v. Bonwich, 699 P.2d 760 (Utah 1985), and Graff v. Graff, 699 P.2d 765 (Utah 1985). See Rule 52(a), Utah Rules of Civil Procedure.

2. Appellant's claim of judicial bias is without merit and was found to be legally insufficient by the Presiding Judge of the Third District. Appellant's claim of judicial bias lacks any factual basis. It was a claim raised by her for the first time in her first appeal and upon remand she reopened that door to make her claims under Rule 63(b), Utah Rules of Civil Procedure. Her claims were properly and appropriately determined before the evidentiary hearing and consideration of the issues upon remand by the assigned judge.

3. The Record shows that the trial judge appropriately and carefully considered the issues as directed by the remand order of the Court of Appeals; an evidentiary hearing occurred; significant evidence was taken concerning those issues; the Court made appropriate amendments to the findings of fact to more fully express the factual basis and the reasonableness and rationale affecting the determination of the Court.

4. There is ample evidence in the Record to show the reasonableness of the Court's disposition.

5. The appeal of Appellant is frivolous and without merit; costs and fees should be awarded to the Appellee. Rule 33, Utah

Rules of Appellate Procedure and Rule 40, Utah Rules of Appellate Procedure.

ARGUMENT

1. Rule 52(a), Utah Rules of Civil Procedure outlines what is required with respect to findings of fact, and states that findings, whether based on oral or documentary evidence, shall not be set aside unless they are found to be clearly erroneous.

> **Rule 52. Findings by the Court**
> **(a) Effect.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b). The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b) 50(a), and (b), 56 and 59 when the motion is based on more than one ground.

2. The November 1, 1991 evidentiary hearing reflects the testimony and evidence the Court had before it in revisiting the issues encompassed by the Court of Appeals remand order. (Record

406 through 421 and transcript, pages 13 through 27).

3. A summary from Appellee's testimony as it pertains to the issues is as follows:

a. Appellee was sworn; he testified that he purchased the home in 1970 [1]; that Appellee was married to his first wife at that time; that she died in April of 1980; that they were married for approximately twenty seven (27) years; that he thereafter married the Appellant, Rita Gum; that she moved into the home; that it was remodeled to provide sufficient space for her children from her previous marriages; that the funds came out of his IRA or otherwise were borrowed for the remodeling; that thereafter he made the payments from his earnings. (Record 407 through 408, Transcript November 1, 1991, pages 14 through 15).

b. The Appellee's testimony showed that he took early retirement; that he had medical problems; that Appellant did not contribute anything financially to the home or to the payment of the encumbrance thereon; that he was married to the Appellant for a total of approximately six (6) years during the time he was employed.

c. The testimony with respect to the West Valley home in which Appellant has made some claim in her appeal, shows that

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[1] This was the home that was sold pursuant to the trial court's direction prior to the conclusion of the divorce and produced a net equity of approximately $10,000.00.

Appellee's son lives in the home; the home when purchased was placed in the joint names of Appellant and Appellee for the reason that the son did not have good credit and did not want to place the title to the home in his name; the parties discussed the same and concluded they would assist him by taking the property in their names. They then gave a Quit Claim Deed to the son conveying any interest in said home to him; Appellant as well as Appellee signed the Quit Claim Deed; the parties did not pick out the home or assist in the down payment or any payments for upkeep, insurance, utilities or taxes, or the encumbrance against the home; neither party provided any money for the purchase of the home and Appellee did not claim any interest therein. (Record 409 through 411, Transcript of November 1, 1991 hearing, pages 16 through 18)[2]

d. With respect to the pension, the testimony as summarized shows that Appellee was married to his first wife for twenty seven (27) years; that he was married to Appellant for approximately eight (8) years; that during the eight (8) years of

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[2] The Court's Amended Findings of Fact dispose of the question concerning the West Valley property as found at Record 331, Amended Finding of Fact #21 as follows:

> The Court having taken additional testimony of the Defendant concerning the West Valley home, finds that the West Valley home was purchased in the name of the parties as a convenience to the Defendant's son because of Defendant's son's credit history; that the son made the down payment, occupied said home, made all of the payments, taxes and insurance and upkeep, and that neither of the parties to this action has an equitable interest in said home. Plaintiff and Defendant executed and caused to be delivered a quit-claim deed for their interest in said home to James L. Gum prior to the instant action on or about the 28th day of August, 1987.

marriage there were at least two divorce actions filed and numerous separations; that the Appellee had retired prior to the time of divorce; that after retirement there were no further accruals or buildups in his retirement plan; that there were only approximately six (6) years of accruals in his retirement plan during the period of the marriage due to his retirement; that he worked for his employer and the accruals were made to the pension plan for thirty six (36) years; the parties discussed the fact that Appellant requested $3,000.00 cash rather than claiming any interest in Appellee's pension or the house; that the net equity in the house at the time of sale was approximately $10,200.00;[3] that the

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[3] Defendant had to make some repairs and incurred expenses to place the house in a position for sale. (Record 419 through 420, Transcript page 26, lines 6 through 25, page 27, lines 1 through 5, and the charges came to $742.07.)

Q. (BY MR. RICHMAN) With respect the 10,200 and some odd dollars from the sale of the house, Rita got $3,000.

From the funds that you got were there numerous repairs that you had to make, and upkeep?

A. Yes, there were.

Q. In order to place it in a position for sale?

A. Yes, there were.

Q. I'll read those off. We have a -- read the various companies and amounts.

THE COURT: That you paid.

THE WITNESS: I paid $520 for professional pest control for a termite inspection, and they found some evidence of termites and they had to treat the home. That was one on August 13th, 1990.

On September 4th, 1990, I paid to Reilly Construction a sum of $50 for sheetrock repair in one of the downstairs bedrooms that was damaged due to the termite damage.

And then on August 9th -- August 9th, 1990, I paid $74.91 to California Repair for the hot tub. And then I had to have them back on August 14th, 1990, for additional repairs for $97.16, and those charges came to --

Appellant actually was paid the $3,000.00 pursuant to her agreement and the stipulation and in accordance with the original decree. (Record 411 through 414, Transcript of November 1, 1991 hearing, pages 18 through 21)[4]

e. Bearing on the issues of the home equity and the pension Appellee testified that there were numerous items of property and household items, expensive items of furniture that were awarded to Appellant; that some of it included his premarital property, including two pianos; that the value of the property items was approximately $27,000.00 and the fair market value was computed at approximately $14,600.00. (Record 414 through 415, Transcript November 1, 1991 hearing, pages 21 through 22)

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[4] The Amended Findings of Fact beginning at Record 326 and continuing through 328, reflect the award of property. Beginning at paragraph #11 of the Findings of Fact at Record 326, there is a long itemization of property, and at Record 328, the Court values that property to have a fair market value of $14,600.00. The Court also addresses the property award at Finding of Fact #14, Record 328, which indicates what the parties had agreed to and that Plaintiff's pension would remain as his separate property.

The Court deals with the pension and the property distribution in the Amended Conclusions of Law beginning at Record 332 and continuing through 333 at Amended Conclusion #4:

> The Court amends Conclusion #4 to read as follows:
>
> Plaintiff should be awarded the sum of Three Thousand Dollars ($3,000.00) and the household furniture, furnishings and household items having a fair market value of $14,600.00 that she has in her possession except those awarded strictly to Defendant which are to be returned to him, representing his interest in the proceeds from the sale of the parties' home and relinquishment of any claim she may have had in the Defendant's pension and retirement benefits which accrued strictly within the time of the parties' marriage, and subject to her return of the Defendant's sword, rifle, binoculars and Llardo.
>
> 5. All other property not previously divided shall remain the sole and separate property of the defendant, including his pension, savings, thrift and/or other benefit plans with his former employer; his savings and any premarital property presently in his possession.

THE COURT PROPERLY ADJUSTED THE PROPERTY VALUES

4. It is clear the Court considered the value of the personal property items received by Rita Gum of $14,600.00 and the $3,000.00 she received from the limited equity in the home was a reasonable adjustment of the parties property under the circumstances. Awarding all of the interest in the pension plan of Appellee to him in accordance with the parties' stipulation at the time of the original divorce was considered fair and equitable by the trial court.

5. It must be acknowledged that the trial court and the Appellee correctly concluded that the parties had entered into a stipulation to resolve all issues prior to the first decree; the stipulation came after extensive discussions in chambers with the Court, Appellant and Appellee and his counsel, and that the findings and conclusions were made thereafter based on those discussions and the resulting stipulation. (Record 403, 404, 405, Transcript of November 1, 1991 hearing, pages 10, 11 and 12)

SUMMARY OF NOVEMBER 1, 1991 TRIAL TRANSCRIPT

The trial transcript is revealing on the issues of this appeal, including Appellant's motion for disqualification.

Transcript page 10, lines 1 - 18

> THE COURT: So I didn't really make these findings and conclusions. It was based upon the discussions we had in chambers, and then it was read into the record. And then I gave the Plaintiff the opportunity to review

the documents so that if she had any objections she could file them.

So I don't know where the Plaintiff is able to conclude that I made these decisions in this particular case.

So you can put some testimony on to support the findings. You may do so, but I surely want to make sure that she was the one that was here, sat in court and agreed, and I didn't make those orders as such until such time as it was submitted by what I thought was a stipulation of the parties. And I think your memorandum reflects that accurately.

So if you want to put some testimony on to support what was done, that's fine. You may do so.

Record 404, Transcript page 11, lines 14 - 25, Record 405, Transcript page 12, lines 1 - 21

MR. RICHMAN: I would like to also put on the record what happened.

We went into chambers, if you recall, and spent most of the afternoon in there with Mrs. Gum and we agreed on what we thought were most all the issues.

THE COURT: Right.

MR. RICHMAN: We then called in Mr. Gum and went through those with her and we all thought we had a full agreement. We came out for the court to read those into the record. Instead of reading it into the record, we read matters we deemed needed clarifying. It was near the end of the day, and then we agreed to come back, in kind of a hasty fashion, as Mrs. Gum was anxious to get her hands on $3,000 which would come out of the sale of the home, and that could be done as soon as the decree was entered.

I made the decree available to her in my office, proposed decree and findings. Whether or not she came by and read it, you know, that was not any of my doing. It was made available to her and she called and knew it was available.

She then went over that decree and findings in chambers, and the two of us together -- and you may recall that she forced a change, if, by interlineation, so it wasn't like she didn't read it and didn't know what it was or what the language in the findings related to, because of the way we had done it, that we had agreed on certain things, and that was the language used throughout.

THE COURT: That's why I'm at a loss how she can claim I was biased or prejudiced, because I did not compel her to sign nor did I compel her to accept what was set forth.

REQUIREMENTS OF RULE 63(b), UTAH RULES OF CIVIL PROCEDURE

6. On the issue of the claim of Appellant that the Court showed bias and should have been disqualified, the Record clearly shows that the Court followed proper procedures as required by Rule 63(b), Utah Rules of Civil Procedure, under which Appellant makes her claim of judicial bias.

Rule 63. Disability or disqualification of a judge

(b) Disqualification. Whenever a party to any action or proceeding, civil or criminal, or his attorney shall make and file an affidavit that the judge before whom such action or proceeding is to be tried or heard has a bias or prejudice, either against such party or his attorney or in favor of any opposite party to the suit, such judge shall proceed no further therein, except to call in another judge to hear and determine the matter.

Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed as soon as practicable after the case has been assigned or such bias or prejudice is known. If the judge against whom the affidavit is directed questions the sufficiency of the affidavit, he shall enter an order directing that another judge (naming him) of the same court or of a court of like jurisdiction, which judge shall then pass upon the legal sufficiency of the affidavit. If the judge against whom

> the affidavit is directed does not question the legal sufficiency of the affidavit, or if the judge to whom the affidavit is certified finds that it is legally sufficient, another judge must be called in to try the case or determine the matter in question. No party shall be entitled in any case to file more than one affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith.

7. The Record at 403, and Transcript of November 1, 1991 proceeding, beginning at page 10 lines 19 through 25 and Record 404 and Transcript of November 1, 1991 proceeding page 11, lines 1 through 13 reflects:

> THE COURT: .....
> So you can put some testimony on to support the findings. You may do so, but I surely want to make sure that she was the one that was here, sat in court and agreed, and I didn't make those orders as such until such time as it was submitted by what I thought was a stipulation by the parties. And I think your memorandum reflects that accurately.
>
> So if you want to put some testimony on to support what was done, that's fine. You may do so.
>
> MR. RICHMAN: I would like to clarify, the court has, as I understand, has reviewed the matter of her claim of bias with Judge Murphy, the presiding judge, and he said that you're not to be disqualified.
>
> THE COURT: I submitted it in writing to him. I didn't have any discussion being I was unable to locate the file for the hearing. I asked if he had the file but he said, "No. I ruled on that issue and you're not to be disqualified."
>
> So that takes care of that issue.
>
> MR. RICHMAN: May I suggest that we have the file documented. Perhaps it can be documented that Judge Murphy did find that.

THE COURT: And probably before you put on the testimony I think it would be better if we locate the file and put it in the record and you can come in some other time and take some testimony.

MR. RICHMAN: Can we preserve the testimony today?

THE COURT: Fine. That's fine. You may.

PRESIDING JUDGE DETERMINED THE BIAS CLAIM

8. It is clear that the Court had presented the matter of judicial bias to the presiding judge; that he had been informed that it was proper for him to continue. Because there was not a document in the file indicating that determination, the Court determined that it would preserve testimony until the file was documented with the order of the presiding judge. The Court reserved ruling on the evidence until after the file was documented with an order on the bias claim. (Record 404, Transcript of November 1, 1991 hearing, page 11, lines 7 through 13)

THE COURT: And probably before you put on the testimony I think it would be better if we locate the file and put it in the record and you can come in some other time and take some testimony.

MR. RICHMAN: Can we preserve the testimony today?

THE COURT: Fine. That's fine. You may.

(Record 417, Transcript of November 1, 1991 hearing, page 24 lines 17 through 22)

THE COURT: It appears to me that's suffice, and I will withhold making a decision in the matter until such time as I am able to locate the file and get Judge Murphy's ruling. On receipt of that file and the ruling I will make a decision and send a minute entry to the

parties.

9. It is clear from reading the record as it applies to what actually occurred, that the Court properly put the matter of the Appellant's motion for disqualification under Rule 63(b), Utah Rules of Civil Procedure to the Presiding Judge, who informed the Court that the claim of judicial bias was legally insufficient and that the trial court should conclude the matter. To be doubly sure that was understood, testimony was preserved and no ruling was made upon the evidence until after a written document signed by the Presiding Judge was entered in the case.

10. The Record makes it clear that the Appellant knew the evidentiary hearing was scheduled for November 1, 1991 at 3:00 in the afternoon. (Record 397, Transcript of October 7, 1991 hearing, page 4, lines 19 through 25, Record 398, Transcript page 5, lines 1 through 11)

> THE COURT: Fine. I'll schedule it for a hearing then regarding those issues only. And then we can set that for -- it shouldn't take more than -- we can set it on November 1st in the afternoon at 3 o'clock.
>
> MS. GUM: Okay.
>
> THE COURT: November 1st, at 3 o'clock. Okay.
>
> And you have a copy of that?
>
> MS. GUM: I do. Also I'm here on another cause.
>
> THE COURT. I can't hear anything else because we're not noticed up for it.

MS. GUM: I was served an order to show cause that he couldn't visit his daughter.

THE COURT: I'll take care of that on November 1st; set it all for November 1st and I'll hear everything at one time. All right.

MS. GUM: I'll see what I can do. That's --

11. It is clear from the record that the Court (presiding judge), had already determined the issue of bias before the October 7 hearing. (Record 398, Transcript October 7 hearing, page 5, lines 14 through 25)

MR. RICHMAN: -- Not necessarily seeking the relief that she's requesting, but -- or disagreeing with the Court, but I reviewed Rule 63 and I guess as an alternative you could call in another judge to determine the matter of her claim of bias.

THE COURT: That's already been done. That's been done. I have already done that.

MR. RICHMAN: Okay.

MS. GUM: Thank you, sir.

THE COURT: Judge Murphy has to make those determinations.

MR. RICHMAN: And he's done that.

<u>THE AMENDED FINDINGS SHOW THE ISSUE OF BIAS WAS PROPERLY DETERMINED</u>

12. The Amended Findings of Fact deal with the claim of judicial bias as found at Record 331 through 332, Finding of Fact #22 which reads as follows:

After remand from appeal, Plaintiff claimed bias and prejudice against her by the trial court. The Court reviewed the matter with the presiding judge who

concluded that there was no bias or prejudice or disability on the part of the trial court to hear this matter, and thereafter, the Presiding Judge, Michael R. Murphy, entered an order referring the matter to the trial court for resolution, concluding that the affidavit of bias and prejudice filed by the Plaintiff was legally insufficient.

THE AMENDED CONCLUSIONS SHOW THE BIAS ISSUE WAS PROPERLY CONSIDERED

13. The Amended Conclusions of Law pertaining to the issue of bias is found at Record 335, Conclusion #12.

> The Court concludes that the trial court had no improper bias or prejudice against the Plaintiff or either party, and no disability to resolve the issues in this action.

APPELLANT'S CLAIMS ARE FRIVOLOUS

14. Appellant's appeal has no merit. She has filed more than one affidavit of impecuniosity. There is evidence that she was not impecunious. (Record 416, Transcript November 1, 1991 hearing, page 23, lines 10 through 25)

> Q. Mr. Gum, another subject, do you recall that when Rita filed an appeal in this case she filed an affidavit of impecuniosity? Are you aware of that?
>
> A. Yes, I am.
>
> Q. And at the time she did that had you also paid her the $3,000?
>
> A. Yes, I did.
>
> Q. And --
>
> A. I didn't; the escrow did.
>
> Q. And at that time, of your own knowledge, was she employed and earning money?

A. Yes. She was working at the Hilton at that time.

Q. In fact the findings of fact as entered by the Court reflected what her earnings were, did they not?

See Appellant's Brief dated the 16th of November, 1992, page 23, fourth paragraph of the Conclusion:

".....Rita's disposable income is far less than James' as well as being less stable"

ATTORNEY'S FEES

15. On the issue of attorney's fees, the Record shows that the Appellant at the time of her first appeal had already received the $3,000.00 cash from the limited funds in the sale of the house; that she had failed and still refuses and fails to provide the Appellee the minimal items of personal property that were awarded to him, all of which were saleable items, including a rifle and scope and binoculars, and a souvenir sword; that the Appellant was working; she received child support from the Appellee for two of her children from a previous marriage; that she had never made a claim for attorney's fees and that the Appellee had never been presented a bill for attorney's fees. (Record 416 through 417, Transcript of November 1, 1991 hearing, lines 15 through 25, and Transcript page 24, lines 1 through 13)

16. The Court found as reflected at Record 326 at Amended Finding of Fact #8:

> The Plaintiff is 53 years of age, having been born on the 20th day of January, 1937. She is employed at the Hilton Hotel and earns on the average of $563.60 (computed from gross earnings of $4,422.10 through the pay period August 26, 1990, or thirty four (34) weeks, averaging $130.06 per week, 52 weeks equal annual earnings of $6,763.21, or $563.60 per month.)

17. Since the original divorce the Appellant has continued to receive child support, and there is nothing to show she has no earnings from work. The Court should require inquiry under oath as to her impecuniosity.

18. So long as the Appellant can abuse the Appellee by filing appeals or continue to prolong the legal process at great cost to the Appellee and at no cost to her, this matter will not be put to rest. See Record 278, 279 where the Appellant in argument in one of her numerous pleadings which bears a date of the 2nd day of October, 1991, at paragraph 4, Record 278, states:

> Plaintiff should be able to continue to prolong the legal process regardless of the expense of the litigation if that is what is necessary to get that which is rightfully hers and the children's.

19. The Amended Findings of Fact the Court entered pertaining to attorney's fees are found at Record 329 and 330, Findings of Fact as Amended, #17, which read as follows:

> The Court amends Findings #17 of the original Findings of Fact to read as follows:
>
> Plaintiff appeared before the Court on the 6th day of December, 1990, pro se. Prior thereto she had filed with the Court a document she labeled "Supplement to Complaint and Partial Response to Defendant's Counter

> Offer of July 25, 1990", outlining therein her desire for a settlement and outlining terms thereof. The Court participated in discussions with the Plaintiff and Defendant's counsel and it appeared to the Court that the proposals being put forward by the Plaintiff were acceptable to Defendant as represented by counsel. The Defendant was then called in to the presence of the Court and the parties reached an agreement to settle all of their matters before the Court. Thereafter the Defendant was sworn and gave testimony in support of his cause and to establish jurisdiction and residence as before recited. Plaintiff made no request on the record for attorney's fees or costs, and offered no evidence to the Court for fees and costs. [emphasis supplied]

20. The Conclusions of Law that the Court made from the evidence pertaining to attorney's fees is found at Record 334, Conclusion of Law #9, which the Court amended:

> The Court amended Conclusion #9 to read"
>
> Each party should be responsible for and pay their separate costs and fees as agreed to by the parties before the Court and for the reason that neither party thereafter made any request for fees or costs or placed any testimony or evidence before the Court regarding fees and costs.

CONCLUSION

The Trial Court acted appropriately; the matter of judicial bias was determined by the Presiding Judge prior to the October 1, 1991 hearing; the written document reflecting the Presiding Judge's determination was entered the 3rd day of December, 1991. Appellant was informed at the management and scheduling conference on October 7, 1991, that an evidentiary hearing would take place on the 1st day of November, 1991. She did not make it known to the Court or

the Appellee or his counsel that she would not appear, but she chose of her own volition not to appear at the evidentiary hearing. The testimony of Appellee was preserved pending receipt of the written document of the ruling of the presiding judge. No ruling was made until after the written document was received by the trial court and filed.

The trial court has appropriately addressed the issues as directed by the remand order and has entered appropriate Amended Findings, Amended Conclusions and an Amended Decree. The total judgment of the Court is supported by the evidence. The specific matters which the trial court was directed to consider have been addressed and evidence was received thereon. The Court's rationale is spelled out specifically and appropriately and is fair and reasonable under all of the circumstances.

The procedure followed was a correct procedure.

The Appellant failed to marshal the evidence in support of any of the issues which she has raised.

The Appellant's appeal is without merit and has been sought for an improper purpose to prolong the legal process.

Her affidavit of impecuniosity should be questioned and an award of attorney's fees and costs should be made to the Appellee upon the filing of an appropriate affidavit or upon a hearing specifically for that purpose and no other.

DATED this 28TH day of January, 1993.

Glen M Richman

GLEN M. RICHMAN
Attorney for Defendant/Appellee

CERTIFICATE OF MAILING AND HAND DELIVERY

I hereby certify that I caused four true and correct copies of the Brief of Appellee to be hand-delivered to Plaintiff - Appellant by delivering a copy to her at her address:

Rita C. Gum
1034 East 900 South
Salt Lake City, Utah 84105

the address shown on Appellant's Brief on this 28TH day of January, 1993. I further certify that I caused to be mailed four copies of the same, sealed with first class postage prepaid thereon in the United States mail at Salt Lake City, Utah on the ____ day of January, 1993.

LEORA LOY

appendix

the jurors that they are the exclusive judges of all questions of fact
(Amended effective Jan 1, 1987)

Rule 52. Findings by the court.

(a) **Effect.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A, in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action Requests for findings are not necessary for purposes of review Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b) The court shall however issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground

(b) **Amendment.** Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly The motion may be made with a motion for a new trial pursuant to Rule 59 When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made either a motion to amend them a motion for judgment, or a motion for a new trial

(c) **Waiver of findings of fact and conclusions of law.** Except in actions for divorce, findings of fact and conclusions of law may be waived by the parties to an issue of fact

(1) by default or by failing to appear at the trial,

(2) by consent in writing, filed in the cause,

(3) by oral consent in open court, entered in the minutes

(Amended effective Jan 1, 1987)

Rule 53. Masters.

(a) **Appointment and compensation.** Any or all of the issues in an action may be referred by the court to a master upon the written consent of the parties, or the court may appoint a master in an action, in accordance with the provisions of Subdivision (b) of this rule As used in these rules the word "master" includes a referee, an auditor, and an examiner The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct The master shall not retain his report as security for his compensation, but when the party ordered to pay the compensation al- entitled to a writ of execution against the delinquent party

(b) **Reference.** A reference to a master shall be the exception and not the rule In actions to be tried by a jury, a reference shall be made only when the issues are complicated, in actions to be tried without a jury, save in matters of account, a reference shall, in the absence of the written consent of the parties, be made only upon a showing that some exceptional condition requires it

(c) **Powers.** The order of reference to the master may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order He may require the production before him of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto He may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may himself examine them and may call the parties to the action and examine them upon oath When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in the Utah Rules of Evidence for a court sitting without a jury

(d) **Proceedings.**

(1) **Meetings.** When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference Upon receipt thereof unless the order of reference otherwise provides the master shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 20 days after the date of the order of reference and shall notify the parties or their attorneys It is the duty of the master to proceed with all reasonable diligence Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make his report If a party fails to appear at the time and place appointed, the master may proceed ex parte or, in his discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment

(2) **Witnesses.** The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Rule 45 If without adequate excuse a witness fails to appear or give evidence, he may be punished as for a contempt and be subjected to the consequences, penalties, and remedies provided in Rules 37 and 45

(3) **Statement of accounts.** When matters of accounting are in issue before the master he may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness Upon objection of a party to any of the items thus submitted or upon a showing that the

appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction, writ of mandate or writ of prohibition during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered

(h) **Stay of judgment upon multiple claims.** When a court has ordered a final judgment on some but not all of the claims presented in the action under the conditions stated in Rule 54(b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered

(i) **Excepting to sureties; justification; multiple sureties; deposit in lieu of bond.** The adverse party may except to the sufficiency of the sureties to the undertaking filed pursuant to the provisions of this rule at any time within 10 days after written notice of the filing of such undertakings, and, unless they or other sureties, within 10 days after service of the notice of such exception, justify before a judge of the court in which the judgment was entered, or the clerk thereof, upon not less than five days' notice to the party excepting to such sureties of the time and place of justification, execution of the judgment is no longer stayed In all cases where the bond required exceeds $2,000 and there are more than two sureties thereon, they may state in their affidavits that they are severally worth the amounts for which they agree to be found if less than that expressed in the undertaking, provided the whole amount is equivalent to that of two sufficient sureties In all cases where an undertaking is required by these rules a deposit in court in the amount of such undertaking, or such lesser amount as the court may order, is equivalent to the filing of the undertaking

(j) **Waiver of undertaking.** In all cases the parties may by written stipulation waive the requirements of this rule with respect to the filing of a bond or undertaking

Rule 63. Disability or disqualification of a judge.

(a) **Disability.** If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or findings of fact and conclusions of law are filed, then any other judge regularly sitting in or assigned to the court in which the action was tried may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial

(b) **Disqualification.** Whenever a party to any action or proceeding, civil or criminal, or his attorney shall make and file an affidavit that the judge before whom such action or proceeding is to be tried or heard has a bias or prejudice, either against such party or his attorney or in favor of any opposite party to the suit, such judge shall proceed no further therein, except to call in another judge to hear and determine the matter

Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed as soon as practicable after the case has been assigned or such bias or prejudice is shall enter an order directing that a copy thereof be forthwith certified to another judge (naming him) of the same court or of a court of like jurisdiction, which judge shall then pass upon the legal sufficiency of the affidavit. If the judge against whom the affidavit is directed does not question the legal sufficiency of the affidavit, or if the judge to whom the affidavit is certified finds that it is legally sufficient, another judge must be called in to try the case or determine the matter in question. No party shall be entitled in any case to file more than one affidavit, and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith

Rule 63A. Change of judge as a matter of right.

(a) **Notice of change.** Except in small claims proceedings, in any civil action commenced after April 15, 1992 in any district or circuit court, all parties joined in the action may by unanimous agreement and without cause, change the judge assigned to the action by filing a notice of change of judge The parties shall send a copy of the notice to the assigned judge and the presiding judge The notice shall be signed by all parties and shall state (1) the name of the assigned judge, (2) the date on which the action was commenced, (3) that all parties joined in the action have agreed to the change, (4) that no other persons are expected to be named as parties, and (5) that a good faith effort has been made to serve all parties named in the pleadings The notice shall not specify any reason for the change of judge Under no circumstances shall more than one change of judge be allowed under this rule in an action

(b) **Time.** Unless extended by the court upon a showing of good cause, the notice must be filed within 90 days after commencement of the action or prior to the notice of trial setting, whichever occurs first Failure to file a timely notice precludes any change of judge under this rule

(c) **Assignment of action.** Upon the filing of a notice of change, the assigned judge shall take no further action in the case The presiding judge shall promptly determine whether the notice is proper and, if so, shall reassign the action If the presiding judge is also the assigned judge, the clerk shall promptly send the notice to the Chief Justice, who shall determine whether the notice is proper and, if so, shall reassign the action

(d) **Nondisclosure to court.** No party shall communicate to the court, or cause another to communicate to the court, the fact of any party's seeking consent to a notice of change

(e) **Rule 63 unaffected.** This rule does not affect any rights under Rule 63.

(Added effective April 15, 1992)

PART VIII.

PROVISIONAL AND FINAL REMEDIES AND SPECIAL PROCEEDINGS.

Rule 64A. Prejudgment writs of replevin, attachment and garnishment.

Prejudgment writs of replevin, attachment and garnishment may be issued under the following conditions and circumstances

(1) The writ shall issue only upon written motion and pursuant to a written order of the court

(2) The court shall not direct the issuance of

l be given an expedited setting for oral argument hin 45 to 60 days from the date of the order grant- the motion. Within two days after submission of appeal, the court will conference, decide the case, l issue a written order which need not be accompa- d by an opinion. Entry of the order by the clerk in records of the court, shall constitute the entry of judgment of the court.

e) **Precedential effect.** Appeals decided under s rule will not stand as precedent, but, in other pects, will have the same force and effect as other :isions of the court.

f) **Issuance of written opinion.** If it appears to ; court after the case has been submitted for deci- n that a written opinion should be issued, the time ıitation in paragraph (d) shall not apply and the rties will be so notified.

ıle 32. Interest on judgment.

Unless otherwise provided by law, if a judgment for ɔney in a civil case is affirmed, whatever interest is .owed by law shall be payable from the date the dgment was entered in the trial court.

ıle 33. Damages for delay or frivolous appeal; recovery of attorney's fees.

(a) **Damages for delay or frivolous appeal.** Ex- pt in a first appeal of right in a criminal case, if the urt determines that a motion made or appeal taken ıder these rules is either frivolous or for delay, it ıall award just damages, which may include single · double costs, as defined in Rule 34, and/or reason- ɔle attorney fees, to the prevailing party. The court ıay order that the damages be paid by the party or y the party's attorney

(b) **Definitions.** For the purposes of these rules, a ivolous appeal, motion, brief, or other paper is one ıat is not grounded in fact, not warranted by exist- ıg law, or not based on a good faith argument to xtend, modify, or reverse existing law. An appeal, ıotion, brief, or other paper interposed for the pur- ose of delay is one interposed for any improper pur- ose such as to harass, cause needless increase in the ost of litigation, or gain time that will benefit only he party filing the appeal, motion, brief, or other ıaper.

(c) **Procedures.**

(1) The court may award damages upon re- quest of any party or upon its own motion. A party may request damages under this rule only as part of the appellee's motion for summary dis- position under Rule 10, as part of the appellee's brief, or as part of a party's response to a motion or other paper.

(2) If the award of damages is upon the motion of the court, the court shall issue to the party or the party's attorney or both an order to show cause why such damages should not be awarded. The order to show cause shall set forth the alle- gations which form the basis of the damages and permit at least ten days in which to respond un- less otherwise ordered for good cause shown. The order to show cause may be part of the notice of oral argument.

(3) If requested by a party against whom dam- ages may be awarded, the court shall grant a hearing.

Rule 34. Award of costs.

(a) **To whom allowed.** Except as otherwise pro- [illegible] dismissed, costs shall be or order is affirmed, costs shall be taxed against ap- pellant unless otherwise ordered; if a judgment or order is reversed, costs shall be taxed against the ap- pellee unless otherwise ordered; if a judgment or or- der is affirmed or reversed in part, or is vacated, costs shall be allowed as ordered by the court. Costs shall not be allowed or taxed in a criminal case.

(b) **Costs for and against the state of Utah.** In cases involving the state of Utah or an agency or officer thereof, an award of costs for or against the state shall be at the discretion of the court unless specifically required or prohibited by law.

(c) **Costs of briefs and attachments, record, bonds and other expenses on appeal.** The follow- ing may be taxed as costs in favor of the prevailing party in the appeal: the actual costs of a printed or typewritten brief or memoranda and attachments not to exceed $3.00 for each page; actual costs incurred in the preparation and transmission of the record, in- cluding costs of the reporter's transcript unless other- wise ordered by the court; premiums paid for supersе- deas or cost bonds to preserve rights pending appeal; and the fees for filing and docketing the appeal.

(d) **Bill of costs taxed after remittitur.** When costs are awarded to a party in an appeal, a party claiming costs shall, within 15 days after the remitti- tur is filed with the clerk of the trial court, serve upon the adverse party and file with the clerk of the trial court an itemized and verified bill of costs. The ad- verse party may, within 5 days of service of the bill of costs, serve and file a notice of objection, together with a motion to have the costs taxed by the trial court. If there is no objection to the cost bill within the allotted time, the clerk of the trial court shall tax the costs as filed and enter judgment for the party entitled thereto, which judgment shall be entered in the judgment docket with the same force and effect as in the case of other judgments of record. If the cost bill of the prevailing party is timely opposed, the clerk, upon reasonable notice and hearing, shall tax the costs and enter a final determination and judg- ment which shall thereupon be entered in the judg- ment docket with the same force and effect as in the case of other judgments of record. The determination of the clerk shall be reviewable by the trial court upon the request of either party made within 5 days of the entry of the judgment.

(e) **Costs in other proceedings and agency ap- peals.** In all other matters before the court, including appeals from an agency, costs may be allowed as in cases on appeal from a trial court. Within 15 days after the expiration of the time in which a petition for rehearing may be filed or within 15 days after an order denying such a petition, the party to whom costs have been awarded may file with the clerk of the appellate court and serve upon the adverse party an itemized and verified bill of costs. The adverse party may, within 5 days after the service of the bill of costs file a notice of objection and a motion to have the costs taxed by the clerk. If no objection to the cost bill is filed within the allotted time, the clerk shall thereupon tax the costs and enter judgment against the adverse party. If the adverse party timely objects to the cost bill, the clerk, upon reasonable notice and hearing, shall determine and settle the costs, tax the same, and a judgment shall be entered thereon against the adverse party. The determination by the clerk shall be reviewable by the court upon the re- quest of either party made within 5 days of the entry of judgment; unless otherwise ordered, oral argument

death, substitution shall be effected in accordance with the procedure prescribed in paragraph (a) of this rule

(c) **Public officers; death or separation from office.**

(1) When a public officer is a party to an appeal or other proceeding in an official capacity and during its pendency dies, resigns or otherwise ceases to hold office, the action does not abate and the public officer's successor is automatically substituted as a party Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution

(2) When a public officer is a party to an appeal or other proceeding in an official capacity, the public officer may be described as a party by official title rather than by name, but the court may require the name to be added

Rule 39. Duties of the clerk.

(a) **General provisions.** The office of the Clerk of the Court, with the clerk or a deputy in attendance, shall be open during business hours on all days except Saturdays, Sundays and legal holidays

(b) **The docket; calendar; other records required.** The clerk shall keep a record, known as the docket, in form and style as may be prescribed by the court, and shall enter therein each case The number of each case shall be noted on the page of the docket whereon the first entry is made All papers filed with the clerk and all process, orders and opinions shall be entered chronologically in the docket on the pages assigned to the case Entries shall be brief but shall show the nature of each paper filed or decision or order entered and the date thereof The clerk shall keep a suitable index of cases contained in the docket

The clerk may keep a minute book, in which shall be entered a record of the daily proceedings of the court The clerk shall prepare, under the direction of the Chief Justice of the Supreme Court or the Presiding Judge of the Court of Appeals, a calendar of cases awaiting argument In placing cases on the calendar for argument, the clerk shall give preference to appeals in accordance with the priority of cases provided in Rule 29

(c) **Notice of orders.** Immediately upon the entry of an order or decision, the clerk shall serve a notice of entry by mail upon each party to the proceeding, together with a copy of any opinion respecting the order or decision Service on a party represented by counsel shall be made upon counsel

(d) **Custody of records and papers.** The clerk shall have custody of the records and papers of the court The clerk shall not permit any original record or paper to be removed from the court, except as authorized by these rules or the orders or instructions of the court Original papers transmitted as the record on appeal or review shall upon disposition of the case be returned to the court or agency from which they were received The clerk shall preserve copies of briefs and attachments, as well as other printed papers filed

Rule 40. Attorney's or party's certificate; sanctions and discipline.

(a) **Attorney's or party's certificate.** Every motion, brief, and other paper of a party represented by record who is an active member in good standing of the Bar of this state The attorney shall sign his or her individual name and give his or her business address, telephone number, and Utah State Bar number A party who is not represented by an attorney shall sign any motion, brief, or other paper and state the party's address and telephone number Except when otherwise specifically provided by rule or statute, motions, briefs, or other papers need not be verified or accompanied by affidavit The signature of an attorney or party constitutes a certificate that the attorney or party has read the motion, brief, or other paper, that to the best of his or her knowledge, information, and belief, formed after reasonable inquiry, it is not frivolous or interposed for the purpose of delay as defined in Rule 33 If a motion, brief, or other paper is not signed as required by this rule, it shall be stricken unless it is signed promptly after the omission is called to the attention of the attorney or party If a motion, brief, or other paper is signed in violation of this rule, the authority and the procedures of the court provided by Rule 33 shall apply

(b) **Sanctions and discipline of attorneys and parties.** The court may, after reasonable notice and an opportunity to show cause to the contrary, and upon hearing, if requested, take appropriate action against any attorney or person who practices before it for inadequate representation of a client, conduct unbecoming a member of the Bar or a person allowed to appear before the court, or for failure to comply with these rules or order of the court Any action to suspend or disbar a member of the Utah State Bar shall be referred to the Ethics and Discipline Committee of the State Bar for proceedings in accordance with the Rules of Discipline of the State Bar

(c) **Rule does not affect contempt power.** This rule shall not be construed to limit or impair the court's inherent and statutory contempt powers

(d) **Appearance of counsel *pro hac vice*.** An attorney who is licensed to practice before the bar of another state or a foreign country but who is not a member of the Bar of this state, may appear, upon motion, *pro hac vice* Such attorney shall associate with an active member in good standing of the Bar of this state and shall be subject to the provisions of this rule and all other rules of appellate procedure

TITLE VI. CERTIFICATION AND TRANSFER BETWEEN COURTS.

Rule 41. Certification of questions of law by United States courts.

(a) **Authorization to answer questions of law.** The Utah Supreme Court may in its discretion answer a question of Utah law certified to it by a court of the United States when requested to do so by such certifying court acting in accordance with the provisions of this rule, but only if the state of the law of Utah applicable to a proceeding before the certifying court is uncertain and answering the certified question will not unduly interfere with the Utah Supreme Court's regular functioning or be inconsistent with the timely and orderly development of the decisional law of the state

(b) **Procedure to invoke.** Any court referred to in paragraph (a) may invoke this rule by entering an order of certification as described in this rule When invoking this rule the certifying court may act either sua sponte or upon a motion by any party

(c) **Certification order.**

(1) A certification order shall be directed to the